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OBTAINING REVISION OF "SWISS" INTERNATIONAL ARBITRAL AWARDS: WHENCE AFTER *THALÈS*?

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On July 12, 1990, Frontier AG ("Frontier"), a Swiss company based in Bern, entered into a fiduciary agreement with Alfred Sirven, then a director of the French oil group Elf Aquitaine ("Elf"). Frontier, one of many Swiss fiduciary companies, was thereby empowered to act in its own name but really on Sirven's behalf and Frontier would henceforth follow his instructions against a fee. A few days later, the French group Thales—at the time Thomson CSF—undertook to pay Frontier a commission of 1% on the sale price of certain frigates to the Republic of China ("ROC"). Frontier was to assist and facilitate the conclusion of the sale and in 1991 it assigned its claim to a Portuguese company, Brunner Sociedade Civil de Administraçao Limitada ("Brunner"). Six F-3000 frigates were indeed contracted for by the ROC for a price of USD 2,512,585,152. The French government, initially opposed, eventually relented and the transaction went ahead. Frontier and Brunner[1] thus demanded payment of the commission (amounting to 160 million French francs, *i.e.* about 35 million USD at the time). Thales (Thomson) demurred. Frontier and Brunner filed a request for arbitration with the ICC, based on a clause in the 1990 agreement between Thales (Thomson) and Frontier providing for arbitration in Geneva under French law.

Thales (Thomson) argued that the 1990 undertaking was void because its real purpose had been to pay off a third party who would intervene to persuade the French government to authorize the transaction, thus making the contract illicit under French law and contrary to public policy. Frontier/Brunner denied the charge and stated that the purpose of the agreement was to retain the services of a certain Edmond Kwan, a consultant to Elf in the People's Republic of China ("PRC"), who used his network of connections there to remove the opposition of the PRC to the sale of warships to the ROC.

Presided over by a well-regarded Spanish jurist and former government minister, Jose P. Perez-Llorca, assisted by two party appointed arbitrators (François Brunschwig, a Geneva lawyer and Jean-Denis Bredin of the Paris

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[1] The latter had been assigned the claim, but both acted as claimants in the arbitration proceedings.

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Bar), the ICC arbitral tribunal heard witnesses in Geneva in March 1994, Edmond Kwan and Alfred Sirven among them. In its subsequent award, issued in July 1996, the arbitral tribunal found that the evidence established "beyond any possible dispute the reality of the services expected from Mr. Kwan and performed by him". Sirven's testimony, Kwan's and a 1995 letter from Thomson's chairman in 1993, Loïk Le Floch Prigent, showed that there had been no remuneration for any favors sought from the French government or indeed that of the ROC. Thales (Thomson) was thus ordered to pay USD 25,125,851 and FF 12,691,040 with interest because the evidence presented persuaded the arbitral tribunal that the 1990 contract between Thales (Thomson) and Frontier was genuine and legitimate.

However, it was not. A long and complex subsequent criminal investigation in France and in Switzerland showed that in reality, Sirven had been hired to find a way to persuade Roland Dumas, at the time the French minister of foreign affairs, to withdraw his opposition to the sale of the frigates. Sirven had both Kwan and an alluring lady, Christine Deviers-Joncour, on the payroll of the Swiss subsidiary of Elf. She was close to Roland Dumas and claimed that she could cause him to change his mind, which she did. Kwan was then told by SIRVEN to appear as the beneficiary of the 1% commission, which was in reality to be divided between Sirven and Deviers-Joncour, with Kwan receiving USD 2 million for his services. The evidence presented to the arbitral tribunal in 1994 was revealed as being false and carefully orchestrated to deceive the arbitrators into believing that Kwan had been performing *bona fide* services in the PRC. Both he and Sirven lied to the arbitrators in their testimony.

Sirven died in 2005 and on October 1st, 2008 the French *juge d'instruction* in charge of the investigation held that the charges against Kwan, Deviers-Joncour and some other relatively minor characters were not sufficient to justify a trial when the mastermind of the fraud could no longer be prosecuted because he had passed away. No one was tried or sentenced as a consequence of the criminal investigation.

In the meantime, Thales (Thomson) had unsuccessfully challenged the 1996 award in front of Switzerland's Supreme Court, the Federal Tribunal.[2] In 1999, the Paris Court of Appeals had stayed the enforcement of the 1996 award at Thales' request.

On December 17, 2008 Thales relied on the October 1st, 2008 decision of the French magistrate and on the results of the criminal investigation to apply to the Federal Tribunal for revision of the award, because the decision of the arbitral tribunal had been influenced by criminal activities.

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[2] Judgment 4P.240/1996 (January 28, 1997) 1998 ASA Bulletin 118 (in French).

On October 6, 2009, the Swiss Federal Tribunal granted the request and annulled the award.[3] This was only the second time[4] that the Federal Tribunal has accepted a request seeking revision of an international award issued in Switzerland and the first time it did so because the award had been secured by fraud or other criminal means.

The *Thales* judgment of the Federal Tribunal is unlikely to result in a new arbitral award as the efforts to seek enforcement of the 1996 award are bound to fail now that the award has been conclusively shown to be contrary to public policy and to have been obtained by a particularly repugnant scheme of lies and forgeries. So too the opinion is not exceptionally interesting from a scholarly point of view: the Federal Tribunal recounted the fraud in details and the conclusion was unsurprising in view of Swiss law. Yet the *Thales* decision has caused considerable interest in the international arbitration community and is generally regarded as a confirmation that Swiss courts will not look kindly at fraud to secure an international award in an arbitration held in Switzerland.[5]

I. The Concept of Revision

Revision is an extraordinary legal remedy through which an enforceable judgment may be annulled under certain specific, limited, circumstances. It is generally considered as more germane to civil law systems than to their common law counterparts.[6] Revision is to be clearly distinguished from ordinary annulment proceedings. Whilst the latter make it possible to seek the annulment of an award by appealing it to the Federal Tribunal on certain grounds, revision is an extraordinary legal remedy, which under certain circumstances, makes it possible to reopen the proceedings in front of the Federal Tribunal and, if successful, will cause the matter to be sent

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[3] Judgment 4A_596/2008 (October 6, 2009), in French. An English translation is available at www.praetor.ch.

[4] Judgment 4P.102/2006 (August 29, 2006) 2007 ASA Bulletin 550 (in German). That case will be discussed hereunder at note 41.In a previous decision, the Federal Tribunal had rejected an appeal against the same award. See Judgment 4P.208/2004 (December 14, 2004).

[5] See Laurent Hirsch Révision d'une sentence arbitrale 12 ans après, Jusletter January 4, 2010 1-15, also Antonio Rigozzi and Elisabeth Leimbacher The Swiss Supreme Court Refits the Frigates 27 J.Int.Arb. 3 307-316 (2010).

[6] Laurent Hirsch's article quoted above at note 5 contains an excellent summary of the Swedish, Dutch, Belgian, Spanish, French, English, German and Italian approaches to revision. Also see Jean-François Poudret / Sébastien Besson Droit comparé de l'arbitrage international 834-839 (2002); Yves Derains La revision des sentences dans l'arbitrage international, *Liber Amicorum Karl-Heinz Böckstiegel* 165-176 (2001); Antonio Rigozzi / Michael Schöll Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG 5-8 (2002). Also see with regard to Sport Arbitration Antonio Rigozzi Challenging Awards of the Court of Arbitration for Sport I Journal of International Dispute Settlement 217-265 at 255 ff.

back to the arbitral tribunal—or even to a new arbitral tribunal—even though the time limit to initiate annulment proceedings may have expired several years ago.

The Swiss law on revision of international arbitral awards is judge made and it was created in 1992.[7] The Federal Tribunal had been seized of a request for revision of a May 1991 award, which had been upheld in the normal setting aside process (the Federal Tribunal having rejected an appeal on September 30, 1991). The petitioner was now claiming that a witness had a personal interest in the outcome of the case and, relying on the statutory law then applicable to federal judicial proceedings in Switzerland,[8] it sought revision although PILA[9] is silent on the issue. The Court found that PILA contained a lacuna, as it had not been the intent of the legislature to make revision impossible as to arbitral awards.[10] The Court noted that legal writing was practically unanimous in favoring revision and proceeded to justify it in principle as follows:

> It must be possible to question the authority of a judgment when the factual findings appear false without any fault of the parties and when knowing the exact facts would have led to a different legal assessment. Yet the security of legal relations must also be taken into account; the possibility to attack an enforceable decision must be limited in time. In the final analysis, a decision based on erroneous or incomplete facts although the responsibility of the parties may not be invoked at all, gravely violates the sense of justice and is arbitrary within the meaning of art. 4 Cst.[11] (....)...if an award relies on factual findings distorted by criminal behavior or inaccurately found and in disregard of the real situation without fault, the absence of any reassessment would consecrate a clear violation of the fundamental principles of procedure.[12]

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[7] ATF 118 II 199 (March 11, 1992), in French. It is worth noticing, that whilst establishing the principle of revision of international arbitral awards, the Federal Tribunal *rejected* the petition for revision in the case.

[8] The *Loi fédérale d'organisation judiciaire* ("OJ") of December 16, 1943 which has now been substituted by the *Loi sur le Tribunal fédéral* ("LTF") of June 17, 2005 (RS 173.110) in force since January 1st, 2007.

[9] PILA is the most frequently used English abbreviation for the Swiss Federal Statute on Private International Law of December 18, 1987 (RS 291).

[10] Following authoritative legal writing in this respect. See Lalive / Poudret/Reymond Le droit de l'arbitrage interne et international en Suisse 443-444 N.5 ad art. 191 LDIP (1989).

[11] Article 4 of the Swiss Constitution in force at the time contained a due process clause prohibiting arbitrary decisions by state organs.

[12] ATF 118 II 199 at 202 (March 11, 1992), translated from the French original.

Having thus justified revision in principle, the Court went on to decide who should have jurisdiction. Whilst the basic rule is that revision should be sought from the court which issued the decision, an arbitral tribunal is generally *functus officio* once the award is issued. The Swiss Inter-cantonal Convention on Arbitration of August 27, 1969 ("SICA") gave jurisdiction to the Cantonal court at the seat of the arbitration. International arbitrations being matters of federal law unless the parties chose to submit to cantonal jurisdiction—a very rare occurrence indeed—it was logical for the Federal Tribunal to allocate jurisdiction for revision to itself.

Finally, grounds for revision could conveniently be borrowed from existing statutory law, at the time the 1943 Federal Statute Organizing Federal Courts ("OJ"). However the OJ contained grounds for revision which could *also* be grounds for ordinary setting aside proceedings. Thus, for instance, article 136 LOJ made revision possible when the decision went *infra* or *ultra petita* or if the court was not properly composed and this could already be cured on the basis of article 190(2) PILA. Thus, the Court took the view that only the grounds for revision, which could not be raised in ordinary setting aside proceedings, would be accepted. In other words, if the arbitral tribunal was not properly composed, this would have to be invoked in the setting aside proceedings and not in a subsequent attempt at obtaining revision. Whilst certainly logical, the distinction was not free of ambiguity.

II. Material Requirements for Revision of a "Swiss" International Award

As a consequence of the 1992 case, revision became possible for international awards issued by an arbitral tribunal having its seat in Switzerland and the rules heretofore applicable only to domestic arbitrations under SICA were extended to international cases by way of a reference to the OJ, which contained provisions on revision very similar to those of SICA.

Thus, art. 41 SICA provides for revision when (i) the award was influenced by a crime as determined in a criminal trial unless such a trial is impossible for reasons other than lack of evidence or (ii) when some important facts predating the award or some conclusive evidence were not presented because the petitioner could not introduce them in the proceedings. Revision must be sought within sixty days from the time the petitioner became aware of the ground for revision and in any event within five years after the award.

The regime applicable to domestic arbitrations will change as of January 1st, 2011 when the new Federal Code of Civil Procedure of December 19,

2008 ("CPC") comes into force. The new Code applies to domestic arbitrations whilst not formally abrogating SICA as the latter is an inter-cantonal convention which, constitutionally speaking, the federal legislature does not have the authority to abolish. As pointed out by authoritative legal writing on the CPC[13] however, it is expected that SICA will become inoperative as of the entry into force of the CPC, pending its formal abrogation by the Cantons.

Article 396 CPC makes revision of an internal award possible when (i) some pertinent facts or relevant evidence are discovered after the award has been issued and the petitioner could have relied on them in the arbitration; thus the facts or the evidence must have occurred before the award, as later facts could not have influenced the decision; (ii) a criminal investigation establishes that the award was influenced by a crime. The main way to prove the existence of a crime is of course to produce evidence of a conviction. However, if prosecution is impossible—as it was in the *Thalès* case—proof of the crime may be adduced by other means; (iii) the petitioner shows that a withdrawal of the claim, a consent award or a settlement were not valid. Finally, (iv) revision may also be sought if the European Court of Human Rights finds a violation of the ECHR[14] or of its Protocols which cannot be compensated or cured by any means other than a revision of the award. The request for revision must be filed within ninety days of and in any event ten years after the award.

As of 2007, the old OJ was replaced by the *Loi sur le Tribunal fédéral* of June 17, 2005 ("LTF"), which now contains the law[15] of revision applicable to international arbitral awards issued in arbitrations where the seat of the arbitration was in Switzerland. Whilst the LTF mainly took over the previous regime, it is worth pointing out its essential characteristics:

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[13] See Christian Lüscher / David Hofmann Le Code de procédure civile at 3, Stämpfli Ed. (2009). Remarkably, the draft bill submitted by the Swiss government was moot on the issue of SICA's future status. See FF 2006 p. 6859, 6875 and 6999. The debates in the Swiss Parliament do not appear to have raised the issue either. See Stenographic Bulletin of Swiss Council of States 2007 641.

[14] European Convention on Human Rights of November 4, 1950 RS 0.101. As to whether the ECHR applies to arbitration proceedings at all, see Poudret / Besson *op.cit* 86-87. The authors hold the view that the Convention is not applicable to arbitration, given that an arbitral tribunal is not a state organ and accordingly may not cause the state to be liable under the ECHR. Be this as it may, a violation of the ECHR would in any event have to be contained in the judgment of the Federal Tribunal deciding an appeal against the award, as the latter cannot be challenged in itself because Article 35 (1) of the Convention requires the prior exhaustion of internal remedies.

[15] See Articles 121 to 128 LTF.

- Revision may be sought if subsequent to the issuance of an award the petitioner discovers some pertinent facts or conclusive evidence, which he could not invoke in the arbitration, to the exclusion of facts or evidence subsequent to the award.[16]
- Revision is also possible when a criminal investigation establishes that the award was influenced to the petitioner's detriment by a crime, even though no one may have been sentenced: should a criminal prosecution be impossible, evidence of the crime may be adduced by different means.[17]
- Revision *may* be possible in the unlikely event that a judgment of the Federal Tribunal rejecting an appeal against an international award is found by the ECHR to be in violation of the European Convention.[18] The hypothesis appears remote and it would most likely result in the Federal Tribunal revising *its own* judgment and annulling the award.
- Finally, the LTF[19] makes revision possible when (i) the provisions as to the composition of a court or those regarding the challenge of judges were not abided by; (ii) when the court issued a decision *ultra* or *infra petita* or illegally awarded something else than what was claimed; (iii) when the Court did not decide as to some of the submissions in front of it and (iv) if some pertinent facts contained in the file were inadvertently disregarded. International practitioners will have noticed that similar grounds are also contained in the Swiss PILA[20] as an international award may be set aside for the reasons just quoted at (i) (ii) and (iii), whilst the disregard of pertinent facts would have to be construed either as a denial of due process or as a violation of public policy. In other words, the reference in the LTF as to grounds for revision may result in two different remedies being available for the same violation. The OJ had essentially the same provisions and previous case law[21] had held that revision was not available to the extent that the same grievances could have been raised in an appeal based on Article 190 (2) PILA.[22] However, subsequent case law pointed out that the arbitrator's lack of

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16 Art.123 (2) (a) LTF.

17 Art. 123 (1) LTF.

18 Art. 122 LTF.

19 Art. 121 (a)(b)(c) and (d) LTF.

20 See respectively Article 190 (2) (a) and (c) PILA.

21 Judgment of November 25, 1993 in *Republik of Transkei v. Ferdinand J. Berger and Steyr-Daimler-Puch AG* 1994 ASA Bulletin 253 (in French). Later ATF 129 III 727 (October 16, 2003) at 729 (in French).

22 A view criticized by Poudret/Besson, *op.cit* 837.

> independence could conceivably fall within both LTF and PILA but left open the issue as to whether previous case law should be maintained or not.[23] In other words, if a ground for challenging an arbitrator is also a ground for setting aside *and* the aggrieved party finds out before the 30 days time limit to appeal the award, then the issue cannot be raised in a request for revision at a later stage. If the subsequent violation of Article 121 (a) LTF is discovered only later, then revision *may* be possible. As to the other grounds contained in Article 121 (b) LTF, these would necessarily result from the award (*infra* or *ultra petita*) and so would a refusal to decide as to some of the submissions or the inadvertent disregard of some of the facts contained in the file. In other words, a party seeking redress because an arbitrator did not have the required independence or was biased—thus leading to the arbitral tribunal being irregularly composed—*may* be able to seek revision of the award if the petitioner discovered the ground for challenge after the 30 day time limit to appeal the award expired.[24] Yet the burden of proof will be on the petitioner and the two judgments of 2008 quoted above suggest that the Federal Tribunal will need to be very strongly convinced that proper diligence could not have brought to light earlier the circumstances now relied upon to seek revision. As to an inadvertent disregard of some of the facts under Article 121 (d) LTF, I am not aware of any attempt to obtain revision on that ground, but it would be most likely to fail, because in ordinary setting aside proceedings, the disregard of pertinent facts may be construed as either a violation of due process or, possibly, as a violation of public policy. However, both are interpreted very restrictively by the Federal Tribunal in setting aside proceedings and it is most unlikely that the Court would grant in revision proceedings that which it has constantly denied in setting aside proceedings.[25]

Revision must be sought within 90 days from the discovery of the ground(s) for revision (except for the purposes of Art. 121 LTF, which sets the time limit at 30 days) and in any event within ten years after the award. However, the ten years time limit does not apply when the award was

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[23] See Judgment 4A_528/2007 (April 4, 2008) at 2.3. (in German). An English translation is available at www.praetor.ch and at 2 Swiss Int'l Arb.L.Rep 227 (2008). Also see the subsequent Judgment 4A_234/2008 (August 14, 2008) at 2.1 2009 ASA Bulletin 512 (in French). An English translation is available at www.praetor.ch and at 2 Swiss Int'l Arb.L.Rep 303 (2008).

[24] Laurent Hirsch holds a different view (*op.cit* at Rz 66 p. 14). Other legal writing is divided on the issue. See the writers quoted by Laurent Hirsch *op.cit* note 126.

[25] For a recent decision in this respect, see Judgment 4A.550/2009 of January 29, 2010 at 5.1 and 6.1.

influenced by a crime to the petitioner's detriment. This means that a "Swiss" award in which false testimony was presented, an arbitrator was bribed or some other crime influenced the decision, may be the object of revision proceedings even beyond the ten years time limit.[26] This does not mean that any false testimony would be sufficient to seek revision. The testimony would have to be materially relevant to the decision and clearly false, even designed to mislead, such as the cunning lies proffered in front of the *Thalès* arbitral tribunal.

Similarly to the solutions adopted by both SICA and the CPC, revision falls within the exclusive jurisdiction of the Federal Tribunal,[27] which may not decide the merits of the case itself. If revision is granted, the case goes back to the original arbitral tribunal or to a newly constituted one as the case may be.[28] As will be seen hereunder, however, revision remains for the Federal Tribunal to order and not for the arbitral tribunal even though it might still be in function.

Swiss case law has not yet been confronted with an arbitration agreement *excluding* revision.[29] Conceivably, an arbitration clause could also provide that revision would have to be sought from the arbitral tribunal itself, or perhaps from a cantonal court or an arbitration institution. Since the parties may opt out of some or even all grounds for annulment of an award as long as they have no domicile or residence in Switzerland,[30] there appears to be no reason to prevent them from adopting their own provisions as to revision as well, perhaps also relying in this respect on the fact that a certain degree of control of the award might be exercised at the enforcement stage.[31] On the other hand, simply by opting out of annulment proceedings they cannot be deemed to have excluded revision as well,[32] although a renunciation to annulment proceedings based on PILA would extend to the grounds for revision at Art. 121 (a) (b) and (c) LTF as it would be absurd to opt out of annulment proceedings but not of revision for the same grounds.

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[26] Art. 124 LTF.

[27] A solution criticized by Bernhard Berger / Franz Kellerhals Internationale und interne Schiedsgerichtsbarkeit in der Schweiz 626 (2006).

[28] A new arbitral will have to be created when the original one is *functus officio* and may not be constituted again, for instance when one arbitrator passed away or it is impossible to reconvene the same *ad hoc* tribunal.

[29] The issue was raised in a 1997 case but the Federal Tribunal simply held that the arbitration clause in that case did not meet the requirements for a specific agreement to opt out of appeals pursuant to Art.192 PILA. Hence there was no need to decide whether opting out of revision as well was at all possible or not. See Judgment of July 2, 1997, 1997 ASA Bulletin 497 (in French).

[30] See Article 192 (1) PILA.

[31] Poudret / Besson *op.cit* 836.

[32] Berger / Kellerhals *op.cit* 635.

In any event, a clause opting out of appeals will not automatically extend to revision and would have to be specific and clearly embody the parties' agreement to exclude annulment proceedings *and* revision of the award.

Where serious crimes are involved such as those in the *Thales* case, it is accordingly doubtful that the parties could freely renounce even the right to seek redress should the other party corrupt the arbitral process by criminal means. Bernhard Berger and Franz Kellerhals suggest that since the parties may freely opt out of judicial review even for an award contrary to public policy, there is no reason to prevent them from contracting out of revision should the award be influenced by criminal activities, as subsequent controls remain available if enforcement is sought.[33] Such a view is commendably liberal but it appears unlikely to prevail in practice. The crimes by which an international arbitral award may be influenced are particularly repugnant: forging documents, perjury, corruption, fraud to secure a favorable judgment, etc. The Swiss legislator removed the ten years limitation to seek revision in this respect, thus emphasizing the importance of ensuring a clean judicial and arbitral process. Had the *Thales* arbitration clause contained a waiver of revision, it is very doubtful that the Federal Tribunal would have upheld it. The traditional principle of *fraus omnia corrumpit* must prevail and in the unlikely event of the Federal Tribunal being seized of an other request for revision based on criminal activities as serious as in the *Thales* case, it is almost inconceivable that the Court would dismiss the petition in the face of strong evidence simply because the parties had chosen to rule out revision in their arbitration agreement.

The possibility to seek revision as introduced by Swiss case law should therefore be understood as optional as far as Articles 123 (2) (a) LTF—new facts or evidence, and 121 (a) (b) (c) LTF—irregular composition, *ultra/infra petita*, refusal to decide—are concerned, but mandatory with regard to Article 123 (1) LTF, which provides for revision *at any time* when the award was influenced by a crime.

III. Swiss Cases Subsequent to the March 11, 1992 Judgment of the Federal Tribunal

Case law as to revision of international arbitral awards is limited in numbers: it consists of fewer than twenty cases, decided between 1992 and 2009 and they are mainly of interest because the Federal Tribunal fine-tuned the criteria originally borrowed from statutory law in 1992 in the process of applying them to international arbitration cases in subsequent judgments. Thus a number of salient characteristics of the Swiss approach may be described briefly.

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[33] *Op.cit* 636.

In 1995, an arbitral tribunal issued a partial award dealing with applicable law and one of the parties applied *to the arbitrators* for revision, since the arbitral tribunal was still functioning, thus creating a situation quite different from the rationale of the 1992 decision. In a final award of March 10, 1996, the arbitrators rejected the request for revision and an appeal was made to the Federal Tribunal. The Court held that consistency with the solution adopted by SICA prevailed over any other consideration and confirmed that all requests for revision would have to be made to the Federal Tribunal irrespective of whether the arbitral tribunal was still operational or not.[34]

The same approach was confirmed in 1997: revision of a partial award must be sought from the Federal Tribunal even though the arbitral tribunal has not yet issued a final award.[35] In 2006, however, the Federal Tribunal was seized of a request seeking revision of a 2005 "Preliminary Award" finding that a party had improperly terminated a contract and was basically liable for damages but that the other party was at fault as well. The issue of *quantum* would be decided in the final award. The petitioner claimed that its opponent had been engaged in various illicit or even criminal activities. The Court gave great weight to the fact that the issue of termination had not been decided finally in the Preliminary Award and could be revisited at a later stage. The same applied to the consequences of the alleged illegal activities. Accordingly, the Preliminary Award was not a final finding of a legal or factual issue finally. The arbitral tribunal could still find differently on the merits and the award was therefore not capable of revision.[36]

IV. "New" and "Pertinent" Facts

Facts are "new" for revision purposes if (i) they took place at a time which would have made it possible to rely on them if they had been known to the petitioner (ii) who could not have known about them although he acted diligently and (iii) they appear to be pertinent. In this respect, the Federal Tribunal was careful to emphasize that the ultimate assessment of the importance or pertinence of the new facts was for the (new) arbitrators to decide and not for the Court. It stated the following:

> In other words when deciding a request for revision, the Federal Tribunal is simply to verify on the basis of the legal reasoning contained in the award under challenge whether or not the new

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[34] ATF 122 III 492 (1996), in French.

[35] Judgment of July 2, 1997 1997 ASA Bulletin 498 (in French).

[36] Judgment 4P.237/2005 (February 2, 2006) at 3.2. (in German). Available on the web site of the Federal Tribunal www.bger.ch.

> fact, assuming it had been known to the arbitrators, would have led them in all likelihood to issue a different award.[37]

A *judgment* issued after the award may be a new "fact" and constitute ground for revision but not when the issue on which it pronounces was already considered by the arbitral tribunal. Thus, in a 1997 case, a Russian company sought revision of a 1996 award because on November 15 of the same year a state court had found that the underlying contractual relationship was void due to a violation of exchange control regulations. That possibility, however, had already been taken into account and rejected by the arbitrators and the Federal Tribunal considered "unthinkable" that the subsequent judicial pronouncement would have led the arbitral tribunal to a different solution.[38]

In 1997, revision of a 1996 partial award was sought because subsequent investigations had shown that the Respondent's legal status—a Foreign Trade Association of a former Soviet republic—had been inappropriately described as being capable of owning because subsequent legislation had put it in liquidation. The Federal Tribunal rejected the request, essentially holding that the Respondent's legal status was a matter the Claimant should have investigated earlier.[39]

In construction disputes, hidden defects are not "new" if they were the object of the arbitration proceedings because by definition the petitioner already knew of them.[40] A possible fraud as to the measurements is not "new" if there was a substantial difference between the measurements made at the site and the work invoiced, if the petitioner, acting diligently, could reasonably be expected to find out.[41]

Similarly, some new guidelines of a sport organization as to illicit substances (doping), albeit adopted after the award was issued, are not "new" if they were already contemplated at the time of the arbitration and discussed in the proceedings.[42]

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[37] Judgment of July 2, 1997, 1997 ASA Bulletin 499 (in French); Judgment 4P.117/2003 (October 16, 2003) at 1.2 *in fine* (in French). Available on the web site of the Federal Tribunal www.bger.ch.

[38] Judgment 4P.76/1997 (July 9, 1997) in *N. Aluminium Plant v. E. and S.*,1997 ASA Bulletin 506-512 (in French).

[39] Judgment of July 2, 1997 1997 ASA Bulletin 502 (in French).

[40] Judgment 4P.117/2003 (October 16, 2003) at 3.1. (in French). Available on the web site of the Federal Tribunal www.bger.ch.

[41] Judgment 4P.117/2003 at 3.2.

[42] Judgment 4A_368/2009 (October 13, 2009) at 3.2.2 (in French). An English translation is available at www.praetor.ch.

An important or pertinent fact is, for instance, the discovery, subsequent to the award, that the beneficial owner of a company party to the arbitration was not really a Danish lawyer, as had been claimed in the arbitration, but a state employee, thus giving rise to a suspicion of fraud or money laundering and most likely causing the underlying transaction to be null. Had the arbitrators known that the real beneficial owner was not a Danish lawyer but a (Russian) official, they would probably have decided differently.[43] In that case, the request for revision was granted and the award annulled.

When seeking the revision of an award because one party found out after the award that an arbitrator and counsel for one of the parties belonged to an organization of (sport) lawyers, which allegedly could compromise the independence of the arbitral tribunal, the petitioner had to show convincingly that he would not have been able to bring this to light at the outset of the proceedings, a burden the Court found had not been met in the case at hand.[44] The same was held as to other circumstances which could cast doubt on the arbitrator's independence.[45]

V. "New" and "Conclusive" Evidence

New evidence is that which serves to prove the "new" facts as defined above. It may also extend to facts already known at the time the proceedings were conducted but which remained unproven. In that case, however, the petitioner must show that he could not have introduced the evidence in the proceedings. Conclusive or relevant evidence is that which would likely have led the arbitrators to a different decision had it been presented to them.[46]

When party appointed experts file additional reports, the Court will be very reluctant to consider them as "new" evidence as long as there is some possibility that the same report could have been asked for and produced earlier.[47] The same applies to a witness who could have been heard in the arbitration had the party concerned acted with proper diligence,[48] or to testimony that could have been obtained earlier.[49]

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[43] Judgment 4P.102/2006 (August 29, 2006) at 3 2007 ASA Bulletin 550 (in German).

[44] Judgment 4A_528/2007 (April 4, 2008) at 2.5.3 (in German). An English translation is available at www.praetor.ch.

[45] Judgment 4A_234/2008 (August 14, 2008) at 2.2.2 (in French) 2009 ASA Bulletin 512. An English translation is available at www.praetor.ch and at 2 Swiss Int'l Arb.L.Rep 303 (2008).

[46] Judgment 4P.117/2003 (October 16, 2003) at 1.2. *in fine* (in French). Available on the website of the Federal Tribunal www.bger.ch.

[47] Judgment 4P.117/2003 (October 16, 2003) at 4.2. (in French).

[48] Judgment of July 2, 1997 (in French) 1997 ASA Bulletin 504.

[49] Judgment 4P.120/2002 (September 3, 2002) at 2.2.2 and 3.2.2. (in German). Available on the website of the Federal Tribunal www.bger.ch.

The subsequent discovery of accounting data is not "new" evidence if the data was available at the petitioner's premises, albeit unbeknownst to the company and only came to light after one of the petitioner's employees remembered the existence of an archive room in which documents were found which revealed that what had been presented to the arbitrator as a consultancy agreement was in reality a disguise for an agreement to bribe local officials. The Federal Tribunal held in this respect that the party seeking revision had the documents under its control and should have found out about them earlier.[50] To that extent, the evidence, although undeniably new, could have been produced earlier and the petitioner had only itself to blame for its late production. Similarly, the figures relating to the yearly turnover of two hotels, obtained after the final award, could not justify revision in the absence of strong evidence that it would have been impossible for the petitioner to obtain them during the arbitral proceedings.[51]

VI. Decision "Influenced by a Crime"

As a criminal investigation must *establish* that the award was influenced by a crime to the petitioner's detriment—unless a criminal investigation is impossible, in which case the influence of the crime can be proved by other means—but the mere filing of a criminal complaint against the allegedly biased arbitrator is not sufficient ground for revision.[52]

The existence of a crime may be established by a criminal investigation even though the alleged author is dead, thus making prosecution impossible.

In the *Thales* case, as we have seen, the French *juge d'instruction* had issued a decision on October 1, 2008 in which he dropped the charges *("non-lieu")* as the main defendant had died three years earlier and the evidence was insufficient against the six other defendants. The Federal Tribunal held nonetheless that the existence of a crime had been established by the criminal investigation for the purposes of revision. As the Court put it:[53]

> The staging carefully orchestrated by F____, particularly when he brought forward L____ to make believe that the latter played a decisive role in making the sale of the frigates possible, led the

[50] Judgment 4A_42/2008 (March 14, 2008), ATF 134 III 286 (in German). An English translation is available at www.praetor.ch and at 2 Swiss Int'l Arb.L.Rep 153 (2008).

[51] Judgment of May 11, 1999 2000 ASA Bulletin 323 (in French).

[52] Judgment 4A_234/2008 (August 14, 2008) at 3.1 2009 ASA Bulletin 512 (in French). An English translation is available at www.praetor.ch and at 2 Swiss Int'l Arb.L.Rep 303 (2008).

[53] Judgment 4A_596/2008 (October 6, 2009) at 4.2.3 (in French). An English translation is available at www.praetor.ch.

> Arbitral tribunal to decide against the Defendant, Y____'s opponent in the arbitral proceedings. It is by now recognized under Swiss law that deceiving a court to obtain a decision detrimental to the opposing party's monetary interests may constitute fraud in a case ("Prozessbetrug")[54] falling within the definition of a fraud for the purposes of art. 146 CP.[55]

Thus was closed a particularly distasteful episode, which saw a cunning operator masterminding a scheme to deceive an international arbitral tribunal. The Swiss Federal Tribunal's determination to annul the award even many years later is a welcome contribution to the integrity of the arbitral process in Switzerland and elsewhere. As arbitration becomes more and more the ordinary way to settle international trade or investment disputes and as the amounts involved are sometimes considerable, the risk and the number of fraudulent or corrupt practices is unfortunately bound to increase. Ensuring that international arbitrations remain clean and that those who try to obtain fraudulent awards will fail in the end, even though they may appear to have succeeded at first, is therefore of paramount importance.

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[54] German expression literally meaning "Trial fraud" and describing the process of securing a judicial decision by fraudulent means.

[55] Article 146 of the Swiss Penal Code describes fraud or swindle, an offense punishable by up to five years in jail (ten years if the author is a professional swindler). The offense is committed by (i) deceiving someone by false statements, by hiding true facts or by maintaining someone in error (ii) doing so astutely, *i.e.* in a particularly shrewd way and (iii) thus causing the victim to act in a manner detrimental to its financial interests. In a 1996 case, the Federal Tribunal held that astutely deceiving a court to lead it to a decision against one's opponent is a fraud under art. 146 CP. See ATF 122 IV 197 (June 4, 1996). The opinion is in German.